

Remarks

Claims 3 and 30-32 have been canceled without prejudice or disclaimer. As such, claims 33, 62-65, 93-96, and 123-125 are pending in the present application following the present amendment. No new matter enters by the foregoing amendments. Entry of the amendment and consideration of the application as amended is therefore respectfully requested.

I. Double Patenting Rejections

a. Statutory Double Patenting

Claim 3 stands rejected under 35 USC 101 as claiming the same invention as that of claim 2 of prior US Patent No 7, 273,716. While not concurring with the Examiner's position, to facilitate prosecution, Claim 3 and those dependent therefrom have been canceled without prejudice or disclaimer of the underlying subject matter. As such, this rejection is now moot.

b. Obviousness-type Double Patenting

Claims 3, 30-33, 62-65, 93-96, and 123-125 stand rejected under the judicially created doctrine of obviousness-type double patenting over the claims of US Patent No 7,273,716. While not agreeing with the Examiner's conclusion, in order to facilitate prosecution, Applicants have enclosed a Terminal Disclaimer herewith with regard to U.S. Patent No. 7,273,716. As such, withdrawal of this rejection is respectfully requested.

It is noted that the filing of a terminal disclaimer to obviate a rejection based on non-statutory double patenting is not an admission of the propriety of the rejection. *See, e.g., Quad Environmental Technologies Corp. v. Union Sanitary District*, 946 F.2d 870, 20 U.S.P.Q.2d 1392 (Fed. Cir. 1991) ("filing of a terminal disclaimer simply serves the statutory function of removing the rejection of double patenting, and raises neither a presumption nor estoppel on the merits of the rejection.")

Conclusion

In view of the foregoing remarks, Applicants respectfully request withdrawal of the outstanding rejections and timely allowance of the pending claims. If the Examiner believes that

a telephone conference would be useful in resolving any outstanding issues, she is invited to call Applicants' undersigned representative at (303) 863-2303.

Respectfully submitted,

Date: December 9, 2008

/Milan M. Vinnola/
Milan M. Vinnola (Reg. No. 45,979)
David R. Marsh (Reg. No. 41,408)

ARNOLD & PORTER LLP
Attn: IP Docketing
555 Twelfth Street, NW
Washington, DC 20004-1206
202.942.5000 telephone
202.942.5999 facsimile